MEMORANDUM OF LAW

DATE: April 14, 1992

TO: Kenneth Thompson, Acting Water Utilities Deputy Director, Water Production Division
FROM: City Attorney
SUBJECT: Water Rights in Upper and Lower Otay Reservoir

In your memorandum of February 25, 1992, you review and attach six (6) past communications regarding the proposed development of the Otay Ranch and related water issues. You summarize your position as being one of: 1) protecting the quality and quantity of water to the reservoir; and 2) that development must bear the cost of mitigating any adverse impacts.

We concur in these positions but absent any firm counter position from Baldwin Company (you characterize their concern as "appear to be challenged"), cannot research or advise on the specific issues based on appearance. Rather, your general position is supported by the law; hence, we reference the general support for same.

1. Protecting Water Quantity and Quality

We need not summarize prior detailed works on water rights in California because the subject has been termed both "complex and often confusing" and "dynamic and growing." See Overview of California Water Rights and Water Quality Law, 19 Pac. Law Journal 957 (1988). Hence the "right" to a specific amount of water must always be examined in context and according to the precise character of the water. In general, however, the policy of the state is to accord the highest protection to preservation of municipal use of water. California Water Code section 106.5. Hence the preexisting water rights of the City of San Diego to all groundwater and watercourse sources of the Otay Lakes will be preserved either as a party with prior appropriative rights or as a party with higher beneficial use. California Constitution article 10, section 2; California Civil Code section 1414.

Similarly the quality of the water is protected under the rule of reasonableness as articulated below.

> We find the law in California, both as to urban and rural areas, to be the traditional civil law rule which has been accepted as the basis of harmonious relations between neighboring landowners for the past century. But no rule can be applied by a court of justice with utter disregard for the peculiar facts and circumstances of the parties and properties involved. No party, whether an

> upper or a lower landowner, may act arbitrarily and unreasonably and still be immunized from all liability.
>
> It is therefore incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper landowner to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury.
>
> If the actions of both the upper and lower land- owners are reasonable, necessary, and generally in accord with the foregoing, then the injury must necessarily be borne by the upper landowner who changes a natural system of drainage, in accordance with our traditional civil law rule.

Keys v. Romley, 64 Cal.2d 396, 408-409 (1966) ┌Emphasis added.σ

Hence Baldwin as the upper landowner bears responsibility for changes in the natural system of drainage absent any unreasonable conduct by the City.

2. Development to Bear the Cost of Mitigating Adverse Impacts of Urban Runoff.

Principally this contention appears framed by Baldwin's letter of December 20, 1991 in which it quotes an AWWA publication on Effective Watershed Management for Surface Water Supplies, distinguishing between onsite and regional control. We are not aware that this is Baldwin's specific position, and until their position versus the AWWA is known, any comment would be premature.

Generally you are correct in your position that government may properly require development to bear the reasonable costs of both onsite and offsite improvements reasonably related to the impacts of the development. Both California Government Code section 66483 and San Diego Municipal Code section 102.0408 authorize fees for the purpose of defraying the cost of planned drainage facilities. Hence the general authority is present, but its application must await the final position of Baldwin. Since they indicate the position will be "more fully reviewed and discussed during the plan preparation" (Baldwin letter of December 20, 1991 at page 5), further analysis at this time would be speculative and unproductive.

I trust this gives sufficient general support to the thrust of your policies. We remain available to examine water quality/ quantity issues further once the issues are better defined.

JOHN W. WITT, City Attorney
By

Ted Bromfield
Chief Deputy City Attorney

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